No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

CHARLES F. CLISE and JAMES W. CLISE, JR., as Executors of the Estate of Anna H. Clise, Deceased, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit

— and —

BRIEF IN SUPPORT OF PETITION

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INDEX OF PETITION

	Page
Statement	1
Summary of Matters Involved	2
Jurisdiction	6
Statutes Involved	7
Questions Presented	8
Reasons Relied On for Allowance of Writ	9
Conclusion	12

INDEX OF BRIEF

I. Opinion of the Board of Tax Appeals and the Court Below	13
II. Jurisdiction	13
III. Statement	14
IV. Specifications of Error	14
V. Summary of Argument	16
VI. Argument	17
A. The transfers in question were intended by Congress to be regarded as gifts *inter vivos* subject to the Federal gift tax and were so interpreted by the Commissioner of Internal Revenue both in the Regulations which he promulgated, and in the collecting practices which he followed	18
B. Transfers by the decedent while living, which were free from any retained interest or control, but in which some enlargement of the beneficiaries' rights or shifting of economic benefits coincide with the decedent's death *in point of time only*, are not subject to the Federal estate tax	23
C. *Inter vivos* transfers which are subject to the Federal estate tax must leave in the decedent some connecting interest or right between the decedent and the property transferred, the	

Page

breaking of which by the death of the decedent furnishes at his death the incident upon which an estate tax may attach 29

D. The joint and survivor annuity contracts in question are each divisible and separate contracts, consisting of a life annuity in favor of the decedent and a deferred annuity to the second annuitant to commence at the death of the decedent 35

E. *Helvering v. Hallock*, 309 U. S. 106, decides two questions as to the application of the Federal estate tax, neither of which are present in the transactions under consideration.... 43

F. The gift tax statute and the estate tax statute are supplementary and in *pari materia*, and there is no legal justification for a policy of ultra liberality toward one statute, to the exclusion of the other, in a matter of construction between the two..... 45

G. The test of taxability should be based upon established rules of statutory construction rather than upon shifting views as to the practical effect of transactions..... 48

Conclusion 52

TABLE OF CASES

Bailey v. Commissioner of Internal Revenue, 27 F. Supp. 617, 31 F. Supp. 778 .....27, 28

Becker v. St. Louis Union Trust Co., 296 U. S. 48.... 43

Bingham v. U.S., 296 U.S. 211 26

Chemical Bank & Trust Co. v. Commissioner, 37 B. T. A. 535 48

Clise v. Commissioner of Internal Revenue, 41 B. T.A. 820, 122 F.(2d) 998 .....1, 13

Commissioner v. Estate of A. M. Wilder, 118 F. (2d) 281 .....17, 44

Commissioner v. Kellogg, 119 F.(2d) 54.....34, 44

	Page
Eisner v. Macomber, 252 U.S. 189	41
Gould v. Gould, 245 U. S. 151	46
Gregory v. Helvering, 293 U. S. 465	47
Guggenheim v. Rasquin, 312 U.S. 254	42
Helvering v. Hallock, 309 U. S. 106	10, 15, 16, 43
Helvering v. St. Louis Union Trust Co., 296 U. S. 39	43
Howard v. United States, 40 F. Supp. 697	45
Hughes, Estate of Mary H. v. Commissioner, 44 B.T.A. 1196	30
Industrial Trust Co. v. U. S., 296 U.S. 220	26
Ithica Trust Co. v. U. S., 279 U.S. 151	30
Klein v. U. S., 283 U. S. 231	43
Levy's Estate, 65 F.(2d) 412	26
Lewellyn v. Frick, 268 U.S. 238	30
May v. Heiner, 281 U. S. 238	10, 29, 30, 44
Nichols v. Coolidge, 274 U. S. 531	44
Reinecke v. Northern Trust Company, 278 U. S. 339	10, 25, 26, 28, 31, 32, 44
Saltonstall v. Saltonstall, 276 U.S. 260	30
Sanford's Estate v. Commissioner of Internal Revenue, 308 U. S. 39	11, 18, 45, 46
Shukert v. Allen, 273 U. S. 545	10, 30, 44
Superior Oil Co. v. Miss., 280 U. S. 390	47
Towne v. Eisner, 242 Fed. 702	41
Tyler v. U. S., 281 U.S. 497	30
U. S. v. Merriam, 263 U. S. 179	46

TEXTBOOKS

12 Am. Jur. 816	36
Atkinson on Wills 151	50
Clark's Taxation of Life Insurance and Annuities 265	28
Clark's Taxation of Life Insurance and Annuities 171	43
32 Columbia Law Review 1333	26
40 Columbia Law Review 773	43

Page

13 C.J. 561 35
13 C.J. 562 35
67 C.J. 238 31
29 Georgetown Law Journal 943 ..... 28, 43, 44
54 Harvard Law Review 398 21
34 Illinois Law Review 867 43
38 Michigan Law Review 1032 46
14 Minnesota Law Review 632 32
Page on Wills (2d Ed.) 120, §70 50
Paul's Federal Estate and Gift Taxation, §1.08 17
Paul's Federal Estate and Gift Taxation §7.23 43
Paul's Federal Estate and Gift Taxation, §7.30 30
Paul's Federal Estate and Gift Taxation, §10.08, Note 3 22
81 Pennsylvania Law Review 936 30
28 R.C.L. 62, §6 50
18 Taxes 267, 324 43
18 Texas Law Review 470 43
Vance on Insurance (2d Ed.) 575 29
15 Washington Law Review 46 28
49 Yale Law Journal 1118 ..... 28, 30, 43

STATUTES

Internal Revenue Code §811(c) 9, 17, 18, 26
§1000(a) and (b) 8
Judicial Code, §240 (a) as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U.S. C.A. §347) 6
Louisiana Civil Code §1749 45
Revenue Act of 1926, §302 (c), 44 Stat. p. 70 as amended by Revenue Act of 1932, §803 (a), 47 Stat. 279, as further amended by Revenue Act of 1934, §404, 48 Stat. c. 277 ..... 7, 9
Revenue Act of 1932, §501, c. 209, 47 Stat. 245 ..... 8, 19
Revenue Act of 1934 c. 277, §22(b) (2), 48 Stat. 680 41

REGULATIONS

Page

Regulations 79 (1936 Edition) Art. 2 (2)..9, 20, 22, 26
Regulations 80 (1934 Ed.) Art. 15..... 32
Regulations 80 (1934 Ed.) Art. 17..... 33

MISCELLANEOUS AUTHORITIES

H. J. Res. 529; c. 454, 46 Stat. 1516..... 25
H. R. Rep. No. 708, 72d Cong. 1st Sess. p. 28 (C. B. 1939-1 Part 2 p. 476) 9, 19
Sen. Rep. No. 665, 72d Cong. 1st Sess. p. 39 (C. B. 1939-1 Part 2 p. 524) 9, 19

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

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Charles F. Clise and James W. Clise, Jr., as executors of the estate of Anna H. Clise, deceased, petitioners, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered on October 4, 1941 (R. 79) reported in 122 F. (2d) 998, reversing the decision of the Board of Tax Appeals (R. 38) reported in 41 B.T.A. 820.

This proceeding involves the petitioners' liability for additional Federal estate tax, asserted by the Commissioner of Internal Revenue (R. 21-26). A certified transcript of the record below, consisting of the pleadings, findings of fact, opinion and decision of the Board of Tax Appeals, together with the proceedings, opinion and judgment of the Circuit Court of Appeals for the Ninth Circuit, accompanies this petition.

SUMMARY OF MATTERS INVOLVED

The petitioners are the executors of the estate of Anna H. Clise, who died on February 11, 1936, at the age of 69 years and 11 months. She was a resident of Seattle, Washington.

Between November 23, 1934, and December 27, 1934, the decedent applied for and there were issued to her sixteen non-participating joint and survivor annuity contracts. Four of these contracts were issued by the New York Life Insurance Company, eight were issued by the National Life Insurance Company, and four were issued by the Equitable Life Assurance Society of the United States. Each contract provided for the payment of a specified annuity to the decedent during her lifetime, and, after her death, for the payment of a like annuity to the second annuitant named therein. The second annuitant in each contract was either one of her children or her brother. The full amount of the consideration for the contract was in each case paid as a lump sum out of the decedent's separate funds (R. 32, 33, 34).

The petitioners listed each of the sixteen contracts in the Federal Estate Tax Return filed by them on behalf of the decedent's estate, but excluded these contracts from the decedent's gross estate as non-taxable *inter vivos* gifts. A gift tax return was filed and each contract was valued therein at the difference between the consideration paid for the joint and survivor annuity contract and the lesser sum which a single annuity on the life of the decedent would have cost on the date of purchase. No gift tax was paid on account

of the fact that the total gifts were valued in an amount less than the decedent's specific exemption of $50,000.00. The respondent later determined the values of the sixteen contracts as of the date of the decedent's death and included those values in the decedent's gross estate, resulting in the estate tax deficiency now in controversy.

The facts as to the particular issue here involved were all stipulated before the Board of Tax Appeals. There was included as a part of the stipulation filed with the Board, a copy of each of the sixteen contracts involved, all being similar in character, and those issued by each separate insurance company, being identical in form. One of those issued by the New York Life Insurance Company, No. 55829 (R. 54) is set out in full as follows:

> "NEW YORK LIFE INSURANCE COMPANY
> A MUTUAL COMPANY AGREES TO PAY
> to ANNA H. CLISE, *during her lifetime and upon her death to* JAMES W. CLISE, JR., *if he be* ~~and~~ *living* * * *, the Annuitants, ~~jointly, and after the first death to the survivor of them during the lifetime of such survivor;~~
>
> "AN ANNUITY OF * * * THREE HUNDRED SEVENTY-FIVE 36/100 * * * Dollars payable in equal *Monthly* payments of * * * THIRTY-ONE 28/100 * * * Dollars each; the first payment to be made on the *Twenty-third* day of *December* Nineteen Hundred and *thirty-four* if either of the Annuitants is then living, and subsequent payments on the *Twenty-third* day of *Each month* * * * in every year thereafter, said Annuity terminating with the last *Monthly* payment preceding the death of the last surviving

Annuitant. No proportionate annuity payment will be made to the day of death of the last surviving Annuitant.

"If annuity payments are to be made to any one other than the Annuitants, or if the Company's check for any annuity payment is not to be indorsed personally by the Annuitants, the Company reserves the right to require satisfactory evidence that both or that the survivor of the said Annuitants is living on the date the annuity payment falls due.

"This Annuity is granted upon the declaration that the Annuitants were born on the *Ninth* day of *March*, One Thousand *eight hundred sixty-six* and on the *First* day of *September*, One Thousand *nine hundred* respectively, and if such declaration shall be found incorrect then the amount of Annuity payable under this contract shall be such as the single premium paid would have purchased at the correct ages. Any overpayment or overpayments by the Company, with interest thereon at the rate of six per cent (6%) per annum, shall be charged against the payments to be made after adjustment.

"This policy constitutes the entire contract between the parties and does not participate in the surplus of the Company.

"All benefits under this contract are payable at the Home Office of the Company in the City and State of New York.

"No agent is authorized to make or to modify this contract.

"The reserve held by the Company for this Annuity contract shall be calculated on the Combined Annuity Tables, with interest at 4%.

"This contract is made in consideration of the

payment in advance of the single premium of * * * SEVENTY-FIVE HUNDRED * * * Dollars to be made only by bank draft or certified check to the order of NEW YORK LIFE INSURANCE COMPANY, in exchange for its official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Third Vice-President, a Secretary or the Treasurer of the Company and countersigned by the Cashier of its Branch Office.

"IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this *Tenth* day of *December* Nineteen Hundred and *thirty-four.*

"Eighteen words struck out before signing.

(S) THOMAS A. BUCKNER,
President.

(S) FREDERICK M. JOHNSON,
Secretary.

J. & S.A.-S.P. Adapted.
930-264 Ages: 68½
34
Examined MM.

(Signature unknown)
Registrar.

Joint and Survivor Annuity. Single Premium Non-participating."

On the second sheet of the contract, the following indorsement appears:

"It is hereby agreed that to the extent permitted by law the Annuitants will not have the right to commute, anticipate, transfer or assign any rights or interest in or under this contract or any payments provided for therein.

New York, December 10th, 1934.

NEW YORK LIFE INSURANCE CO.
By Frederick M. Johnson, Secretary."

A second indorsement dated July 3, 1936, was added at the request of the second annuitant, making the

payments quarterly instead of monthly. It has no bearing on the question here at issue.

On the petitioners' appeal to the Board of Tax Appeals, the ruling of the respondent, which included the value of the sixteen contracts in the decedent's gross estate, was reversed (R. 38). The Board of Tax Appeals determined that the contracts were irrevocable, that they could not be altered in any respect by the decedent, that they could not be assigned, that they were not purchased in contemplation of death, and that the decedent had no rights therein except to receive the monthly payments provided for in each (R. 32-36).

An appeal was prosecuted by the respondent to the Circuit Court of Appeals for the Ninth Circuit, and on October 4, 1941, that Court handed down its decision reversing the Board of Tax Appeals on the question here involved and remanding the case to the Board for a finding of value. The question of value has not as yet been determined and, as such, is not involved in this petition (R. 61-79).

JURISDICTION

(a) The jurisdiction of this Court is based upon Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U.S. C.A. Sec. 347).

(b) The judgment of the Circuit Court of Appeals was entered on October 4, 1941 (R. 79). The petition for rehearing was filed (Nov. 3, 1941) within the

time allowed therefor by rule of court, and was denied on November 13, 1941 (R. 80).

(c) This is an action originating in the United States Board of Tax Appeals, involving the power of the Commissioner of Internal Revenue to assess and collect an additional estate tax from the petitioners. The decision sought to be reviewed is that of the Circuit Court of Appeals for the Ninth Circuit referred to in subdivision (b) of this title.

STATUTES INVOLVED

Revenue Act of 1926, Sec. 302 (c), 44 Stat. p. 70, as amended by Revenue Act of 1932, Sec. 803 (a), 47 Stat. 279, as further amended by Revenue Act of 1934, Sec. 404, 48 Stat. c. 277.

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated except real property situated outside the United States * * *
>
> "(c) to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise. in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time, made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in

conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, he deemed to have been made in contemplation of death within the meaning of this title."

Revenue Act of 1932, Sec. 501, c. 209, 47 Stat. 245.

"Sec. 501. Imposition of Tax.

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible;" * * *

QUESTION PRESENTED

The question involved in this case is whether the rights of the second annuitants under the sixteen non-participating joint and survivor annuity contracts which were purchased by the decedent during her lifetime, were gifts *inter vivos* within the meaning and scope of the Federal Gift Tax Statute (Sec. 501 (a) and (b), Revenue Act of 1932; Sec. 1000 (a) and (b) Internal Revenue Code), or transfers which were

made by the decedent and intended to take effect in possession or enjoyment at or after her death, or under which she retained for her life the possession or enjoyment of, or the right to the income from the transferred property, within the meaning of the Federal Estate Tax Statute (Sec. 302 (c) of the Revenue Act of 1926, as amended; Sec. 811 (c) of the Internal Revenue Code).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit of Appeals reversed the Board's determination that the transfers to the second annuitants by means of the contracts purchased were in legal effect consummated gifts *inter vivos* during the life of the decedent. This holding by the Circuit Court is contrary to the intent of Congress when the gift tax statute was enacted, as expressed in H. R. Rep. No. 708, 72d Cong. 1st Sess. p. 28 (C. B. 1939-1 Part 2 p. 476), also Sen. Rep. No. 665, 72d Cong. 1st Sess. p. 39 (C. B. 1939-1 Part 2 p. 524), and the administrative interpretation of the scope of the Federal gift tax, both the contemporaneous and long continued interpretation thereof, as set forth in Art. 2 (2) of Regulations 79 (1936 Edition) relating to the Federal gift tax and the practice of the administrative officers in the collection of this tax.

(2) The Circuit Court of Appeals in this decision held that the alleged enlargement of the contract rights of the second annuitants, or the shifting of economic benefits as to such persons, under circumstances wherein such enlargements or shiftings were

timed to coincide with the decedent's death but had no other direct connection therewith, were taxable substitutes for testamentary dispositions, subject to the Federal estate tax. This is in direct conflict with the decisions of this Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339, and *Shukert v. Allen*, 273 U. S. 545.

(3) The decision of the lower court levied an estate tax on the claimed enlargement of the rights of the beneficiaries in the contracts under consideration, rights which were irrevocably vested in the second annuitants during the life of the decedent. The decedent at the time of her death had no power over, or the management or disposition of, or any string attached to, or any interest, remainder or otherwise, in the benefits to the second annuitants or the purchase price thereof, and at her death no transfer occurred to furnish the incident upon which the estate tax might attach. The holding of the court is contrary to *May v. Heiner*, 281 U. S. 238.

(4) The decision of the Circuit Court of Appeals relied for its chief support upon *Helvering v. Hallock*, 309 U. S. 106, without involving in any way the questions decided in that case. That case determined that a transfer, wherein there was any possibility of reverter to the decedent in respect of the property taxed, was subject to the Federal estate tax, whether that right was contingent or vested. There is widespread confusion and doubt as to the exact meaning and scope of that decision and the meaning of the *dicta* found therein with the result that the lower court extended and misapplied the rules of that case.

It is a matter of paramount importance to the bench and bar alike that the existing confusion and doubt be dispelled by further pronouncements of this court.

(5) The decision of the lower court entirely failed to recognize that the statutes imposing gift and estate taxes are *in pari materia* and must be construed together on a uniform basis. The court adopted a most liberal policy of construction in favor of the estate tax statute and totally ignored the more closely fitting provisions of the gift tax statute. This is out of harmony with the holding of this court in *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39.

(6) The decision has raised a doubt as to the right of a citizen to dispose of his property by irrevocable gift prior to death by implying that such a transfer may amount to a taxable substitute for a testamentary disposition even when the gift tax statute has been complied with and it has been specifically found that the disposition was not made in contemplation of death. Until this court or Congress has defined the term "substitute for a testamentary disposition" to include such a transaction, no inferior court has the right to do so.

(7) The decision involves a question of great importance and fundamental equity to many citizens of this country. It is impossible to estimate the number of contracts of this nature issued by insurance companies in reliance upon the administrative interpretation of the statute and the practice of the collecting officers thereunder to the effect that such transactions were gifts *inter vivos* and subject to the Federal gift

tax. The number of inquiries already received by petitioners concerning the principles involved in this litigation, including inquiries from law schools, bar associations and members of the bar generally, and the widespread source of such inquiries, would indicate that the interested persons are numerous, and that they are greatly disturbed by the decision of the lower court. The question of taxability of such contracts should now be finally settled by this court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted.

CHARLES F. CLISE
JAMES W. CLISE, JR.
As executors of the Estate
of Anna H. Clise, deceased.
Petitioners,

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